SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DC PUBLIC TRUST, 2630 Adams Mill Road, NW, #208 Washington, DC 20009 BRYAN WEAVER 1812 Calvert Street, NW, Unit D Washington, DC 20009 Plaintiffs, v. DISTRICT OF COLUMBIA BOARD OF ELECTIONS, Defendant.	2012 CA 006802 B Judge Laura A. Cordero [Next Event: Emergency Hearing August 30, 2012]

DEFENDANT DISTRICT OF COLUMBIA BOARD OF ELECTIONS'
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS MOTION TO DISMISS

Pursuant to SCR-Civil 12(b)(6), Defendant the District of Columbia Board of Elections (hereinafter "the Board") here respectfully moves to dismiss the Plaintiffs' emergency application for writ in the nature of mandamus and complaint for declaratory and injunctive relief. The Board so moves because the Plaintiffs have failed to state a claim upon which relief may be granted because neither the facts nor the law establish that the Plaintiffs have a clear and indisputable right to a determination that the petition submitted in support of Initiative Measure No. 70 is numerically sufficient both as to overall number and ward distribution.

BACKGROUND

On February 14, 2012, Mr. D. Bryan Weaver, a registered qualified elector in the District of Columbia (hereinafter "Mr. Weaver"), filed with the Board a proposed initiative measure titled "Fair Elections to Restore the Public Trust Initiative of 2012 ("the Initiative)." The proposed initiative was published in the *D.C. Register* on February 17, 2012. On February 27, 2012, the Board held a special meeting to determine whether the Initiative was a proper subject for the initiative process in the District. On the same date, the Board ruled that the Initiative was a proper subject for initiative, and formulated the Initiative's official short title, summary statement, and legislative text. At that time, the name of the Initiative was changed to "The Prohibition on Corporate Contributions Initiative of 2012," and it was designated as Initiative Measure No. 70.

On March 13, 2012, the Board issued to Mr. Weaver a petition form with which to collect signatures in support of the Initiative, and advised him that while the actual deadline by which to submit the petition was September 10, 2012 (180 days after the issuance of the petition form), the deadline by which to submit the petition in order for the Initiative to appear on the November 6, 2012 General Election ballot was July 9, 2012. The Board also instructed Mr. Weaver that, in order for the Initiative to be placed on the ballot, the petition submitted in support of the Initiative must contain the signatures of at least five percent (5%) of the District's registered voters, and that that number in turn must include the signatures of at least five percent (5%) of the registered voters in at least five (5) of the eight (8) District wards, based upon the latest count of registered voters as of at least 30 days before the date on which the petition was submitted. At all times throughout the Initiative's petition circulation period, the Board's

voter registration records were publicly available. Moreover, at all times since the Initiative was filed, the Board's staff has been available and responsive to any questions, concerns, and calls for assistance by Mr. Weaver and/or his supporters regarding the initiative process. For example, the Board's staff provided Mr. Weaver with a copy of the "Standard Procedures for Verification of Initiative/Recall Petitions" manual on July 6, 2012. (Exhibit #1).

On July 9, 2012, Mr. Weaver submitted a petition in support of the Initiative. The petition contained 1,844 pages and 30,359 signatures. Based upon the date that the petition was submitted, the petition had to contain the signatures of at least 23,298 registered voters and meet the requisite ward distribution requirements. Upon receipt of the petition, the Board's staff reviewed the petition pursuant to its standard procedures for determining whether a petition supporting an initiative contains the requisite number of signatures, and whether those numbers meet the qualifying percentage and ward distribution requirements. Although the Board's rules and regulations provide that an initiative proposer may be represented by up to two (2) people who may be present during the counting and validation procedures, and who may pose questions and/or claim any discrepancy, inaccuracy, or error concerning the procedures, Mr. Weaver chose not to avail himself of this opportunity.

After the completion of the petition verification process, the Board's staff determined that the petition submitted in support of the Initiative did not meet the statutory requirements necessary in order for the Initiative to appear on the November 6, 2012 General Election ballot. Specifically, the petition contained the signatures of only 21,572 of the District's registered voters – 1,726 signatures fewer than are necessary for

the Initiative to be placed on the ballot. Moreover, the petition did not meet the ward distribution requirements, garnering the signatures of five percent (5%) of registered voters in only four (4) of the eight (8) District wards (Wards One (1), Three (3), Four (4), and Six (6)).

On August 8, 2012, the Board convened a hearing concerning the sufficiency of the Initiative petition. During the hearing, which Mr. Weaver attended, the Board's Executive Director, Clifford D. Tatum, presented the Initiative's Petition Verification Report, which outlined the staff's findings ("the Report")(Exhibit#2). Based upon the findings contained in the Report regarding the results of the petition verification process for the Initiative, as well as the public testimony of the Board's Executive Director, including his responses to questions by members of the Board regarding the thoroughness of the review process, its conformity with Board of Elections regulations and procedures, and the quality controls employed to minimize error, the Board adopted the Report, certified that the petition submitted in support of the Initiative was numerically insufficient, and that, therefore, the Initiative would not appear on the ballot for the November 6, 2012 General Election. Mr. Weaver asked only one question during the hearing; he inquired about the difference between two particular grounds for rejecting a signature: a mismatch between the address provided by a signer on the petition and the address listed in the Board's records for that signer, and an address mismatch in conjunction with the signer being inactive.

Immediately after the hearing, Mr. Weaver requested and received a copy of the petition. That petition contained notations made by the Board's staff during the petition verification process. Mr. Weaver and DC Public Trust commenced the instant matter

with an Emergency Application for Writ in the Nature of Mandamus and Complaint for Declaratory and Injunctive Relief, filed on Monday, August 20, 2012.

ARGUMENT

Dismissal under Rule 12(b)(6) is proper only where it appears beyond doubt that a plaintiff can prove no set of facts that would support the claim. *Schiff v. American Ass'n of Retired Persons*, 697 A.2d 1193, 1196 (D.C. 1997). Accordingly, the factual allegations are viewed in the light most favorable to the plaintiff and every reasonable doubt concerning those allegations resolved in his favor. *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 174 (D.C. 1996).

When ruling on Rule 12(b)(6) motions, courts may employ a "two-pronged approach." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Although courts must assume the veracity of all "well-pleaded factual allegations" in the complaint, *id*., they need not accept as true "legal conclusions cast in the form of factual allegations." *Kowal v. MCI Communications Corp*., Inc., 305 U.S. App. D.C. 60, 65, 16 F.3d 1271, 1276 (1994). A pleading must offer more than "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action' . . . ." *Iqbal*, 129 S. Ct. at 1949 (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

> The filing of a motion pursuant to Rule 12(b)(6) does not call upon the plaintiff to offer his proof, [h]owever, the pleader must set forth sufficient information to outline the legal elements of a viable claim for relief or to permit inferences to be drawn from the complaint that indicate that these elements exist.

Manago v. District of Columbia, 934 A.2d 925, 926 (D.C. 2007) (citations omitted).

The Plaintiffs have filed suit pursuant to D.C. Official Code § 1-1001.16(l), seeking a writ in the nature of mandamus to compel the Board to accept the petition submitted in support of Initiative Measure No. 70, but they fail to meet the exacting standards for such relief. Courts apply a "rigorous standard" to mandamus actions. *Banov v. Kennedy*, 694 A.2d 850, 855 (D.C. 1997). "The requirements for issuance of a writ of mandamus are that the party seeking the writ must show that his right is 'clear and indisputable' and that he 'has no other adequate means to obtain relief.'" *Id*. at 857. *See also, e.g*., *United States ex. rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931) (a writ of mandamus will issue only where "the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable."). *Cf. Cheney v. United States Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 381 (2004) (even if party meets its burden, courts maintain discretion to reject mandamus if not "appropriate under the circumstances.") (*citing Kerr v. United States Dist. Court for Northern Dist. of Cal.*, 426 U.S. 394, 403 (1976)).

The Plaintiffs have failed to meet this burden. They do not come close to showing – as they must if they are to prevail – that the petition they submitted actually contains the valid signatures of at least five percent (5%) of the District's registered voters, and that that number includes the signatures of at least five percent (5%) of the registered voters in at least five (5) of the eight (8) District wards, based upon the latest count of registered voters as of at least 30 days before the date on which the petition was submitted. *See* D.C. Official Code § 1-1001.16(i). Instead, they excoriate the Board's processes and performance, lobbing accusations of "egregious" counting errors and

random and improper signature invalidation, when they should be identifying, clearly and indisputably, 1726 valid signatures that were improperly invalidated or undercounted, and demonstrating that these signatures are distributed in a manner that enables the petition to meet ward distribution requirements. If the Board's petition verification process was as "materially flawed" as the Plaintiffs claim, this task should not prove the least bit difficult. Then again, if the Plaintiffs, even after their purportedly thorough review of their own petition, could not: 1) determine for themselves how many signatures were actually duplicates (there were 1590) (*See* Exhibit #3: Duplicate Signature Report); 2) discern that several of their own circulators had, in violation of District law, signed petition sheets they had themselves circulated; and 3) see that several of their own circulators had, in violation of District law, signed petitions more than once (one circulator signed the petition six times!)(Exhibit #4: Duplicate Signatures by Circulators), perhaps it is the Plaintiffs' review process that warrants revamping.

The Plaintiffs' case rests primarily on the assertion that the Board speciously undercounted 3073 signatures that, according to the Board's own coding, should have been included among the valid signatures. The Plaintiffs arrived at this conclusion by conducting "a straightforward count of the OK codes and the √ symbols[.]" The problem with this approach is that all "√" symbols are not created equal; each one does not represent a valid and acceptable signature. Had the Plaintiffs reviewed the verification process, and fully understood how Phases I and II of that process actually works, they would have discovered, as the Board's staff did, that they did not have enough signatures. Specifically, the verification process provides that when members of the petition verification team review petition signatures during the initial review, or Phase I, they

indicate their findings regarding each signature using red ink. Valid signatures are marked with a red check, and invalid signatures are marked with a red code that indicates the nature of the defect. For example, signatures belonging to individuals who are not registered are marked "NR," signatures of voters who are not registered at the address listed on the petition are marked "A," and illegible signatures are marked "I."

Signatures that received either an "NR," "A," or "I" are subjected to a second level of review by a different member of the petition verification team. The findings that result from this second round of review, Phase II, are indicated in green ink. [1] If the second round reviewer determines that a signature marked as defective should, in fact, be counted, he or she so indicates with an "OK." If, however, the reviewer determines that the initial finding should stand, he or she so indicates with a green check. A green check, then, indicates two things: 1) that the rejected signature has received a second review; and 2) the second reviewer agrees with the initial review. Accordingly, the validity of a signature is not indicated by the mere presence of a check mark, but rather by the color of that check mark, and by the presence of an "OK."[2]

A tally of the red check marks on the Initiative petition shows that the number of valid signatures is significantly less than the Plaintiffs claim it is. By way of illustration, a copy of Batch 1, which represents the first 100 petition sheets, is included for the court's review. [3] A tally of the green check marks in Batch 1 which are not accompanied by an

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[1] *See* Exhibit #1 at page 6 ("Use the same verification steps as before, but this time use GREEN ink to mark the petition page.").

[2] In some instances during the Phase II review, members of the petition verification team provided a green check and an "OK" for signatures which were determined to be valid. Each of these signatures was counted as valid.

[3] Petition sheets are broken down into batches of 100 sheets which are distributed among the members of the petition verification team. The Initiative petition contained 1,844 petition sheets.

"OK" shows that there were 286 green check marks in that batch. As explained, a green check mark indicates that the second reviewer agrees that the signature is invalid. (Exhibit #5: Batch 1 of 19 of Initiative Petition Sheets with Notations).

In light of the fact that the Plaintiffs had the manual which outlines the Board's petition verification procedures and discusses the use of multiple colors in the two-tier review process as early as July 6, 2012, the Plaintiffs should have known that they could not rely solely on the number of check marks on a black-and-white photocopy of the petition in order to determine how many signatures were deemed valid. However, that is precisely what the Plaintiffs did, to their own detriment. Of equal importance is the fact that the Board invited the Plaintiffs to come to its offices to discuss the results of the petition verification process, but the Plaintiffs declined to do so, choosing instead to launch directly into this action.

While it should suffice to simply state that the Plaintiffs have not met their burden of proving the petition's sufficiency, it is important to highlight the myriad ways in which the Plaintiffs operated against their own interests and thwarted their own undertaking. First, the Plaintiffs shortchanged their own effort by not taking advantage of the full 180-day circulation period provided for by law. *See* D.C. Official Code § 1-1001.16(j)(1) (providing that a proposer of an initiative measure "shall have 180 calendar days . . . to file [the] petition with the Board."). Apparently, it was more important for the Plaintiffs to rush to place the Initiative on the November 2012 General Election ballot than it was for them to provide adequate oversight of the petition circulation process. Had they

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Accordingly, there were 19 batches for the Initiative petition; 18 batches contained 100 sheets, and 1 contained 44 sheets. A copy of Batch 1 is included for the court's review, and copies of the other 18 batches are available if the court wishes to review them.

emphasized accuracy and validity over speed, they might have detected in a timely fashion the numerous address mismatches, duplicate signatures, non-registrant or inactive signers, and other defects that have proved fatal for the petition.

Which brings us to the Plaintiffs' second crucial error: their failure to continually monitor and verify the validity of the signatures they were collecting as they were collecting them. The Board's registration records were publicly available at all times throughout the petition circulation period, and there was adequate time during that period for the proposers to review these records and assess for themselves the validity of the petition signatures. *See Orange v. District of Columbia Board of Elections and Ethics*, 629 A.2d 575, 580 (D.C. 1993)("[S]ince the Board's voter records are publicly available throughout the petition period, that period … provides adequate time for the candidate's supporters to verify that each signer is registered at the address listed in the petition."). It appears that the Plaintiffs did not make a quality control attempt at signature verification contemporaneous with the petition circulation period, but rather opted to employ another strategy: submit an (obviously) unexamined petition, and cry foul when the Board rejects signatures on that petition for defects that could have been detected earlier with a mere modicum of examination.

Next, the Plaintiffs had, but did not make use of, the chance to have watchers present during the petition verification process they are now roundly disparaging. *See* D.C. Official Code § 1-1001.16(o)(1); D.C. Mun. Regs. tit. 3 § 1010 (1998). Such watchers could have asked questions concerning both the process and particular findings, and made claims concerning any perceived discrepancies, inaccuracies, and errors while the process was occurring. The Plaintiffs' failure to participate in such an important part

of the ballot access process is, at best, indicative of a relatively nonchalant attitude concerning the verification process (and the petition circulation process, generally) and, at worst, arguably tantamount to a failure to exhaust administrative remedies.

The Plaintiffs claim that the Board made a variety of errors during the petition verification process that resulted in the petition being deemed numerically insufficient. The most interesting allegation levied is that the Board erroneously failed to count the signatures of "individuals who had likely registered to vote or who had updated their address on record with the Board (on Election Day) only moments before signing the petition." How convenient for the Plaintiffs that all of the 64 such signatures they claim were improperly invalidated were obtained, as they claim, not *before* the individuals had executed a same-day registration or Election Day change of address, but *afterwards*, particularly in light of the rule that, "[i]f [an] address [on a petition] is different [from the residence shown on the signer's voter registration record], the signature shall not be counted as valid unless the Board's records show that the person was registered to vote from the address listed on the petition *at the time the person signed the petition*." D.C. Official Code § 1-1001.16(o)(2)(emphasis added).

Whatever the nature of the claims the Plaintiffs make regarding the deficiencies in the Board's process, the bottom line is this: they must prove that the petition is numerically sufficient, and that they are clearly and indisputably entitled to have the Board so certify. But that is not all; they must also prove the absence of another adequate remedy. This they cannot do. As the Plaintiffs themselves acknowledge, if the Board's order stands, there is nothing that precludes the Plaintiffs from starting the ballot access process anew. The Initiative has already been determined to present a proper subject for

initiative. Accordingly, the Plaintiffs may re-submit the Initiative, circulate a new petition, and collect enough valid signatures so that the measure may be placed on the ballot at the next primary, general, or city-wide special election held at least 90 days after the Board certifies that the measure is qualified to appear on the ballot. *See* D.C. Official Code § 1-1001.16(p)(1). It is highly likely that there will be a city-wide special election before May of next year; if the Plaintiffs are successful in their ballot access efforts, they may present the Initiative at that time.

CONCLUSION

For the foregoing reasons, the Defendant Board of Elections respectfully moves to dismiss. A proposed order is attached hereto.

DATE: August 28, 2012

Respectfully submitted,

KENNETH J. McGHIE
General Counsel, D.C. Board of Elections

/s/
TERRI D. STROUD, Bar No. 465884
Senior Staff Attorney, D.C. Board of Elections
Email: tstroud@dcboee.org
441 Fourth Street, N.W., Suite 270 North
Washington, D.C. 20001
Telephone: 202.727.2194

Counsel for Defendant

CERTIFICATE OF SERVICE

Copies filed and served electronically, via e-mail, and through eFiling for Courts, this 28th day of August, 2012, for those so registered; for those not registered, copies were filed and served electronically:

Elizabeth Getman
Sandler, Reiff, Young & Lamb
1025 Vermont Avenue, N.W.
Suite 300
Washington, D.C. 20005

/s/
TERRI D. STROUD, Bar No. 465884